

No. 11629

United States
Circuit Court of Appeals
For the Ninth Circuit.

ELY A. TODOROW and
LEONARD A. POTOLSKI,
Appellants,
vs.

UNITED STATES OF AMERICA,
Appellee.

SUPPLEMENTAL
Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division

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Mr. Lavine: Might I make an additional motion, your Honor, on that license matter? At this time I move to strike all of the answers of Mr. Todorow, and ask that the jury be instructed to disregard the questions and answers, on the ground it is an attempt to charge the defendant with another offense not charged in the indictment, or information here, irrelevant, incompetent and immaterial; and that it is improper cross-examination and that there was nothing [598] asked on direct examination regarding the matters thus elicited on cross-examination.

The Court: Motion denied. [599]

* * * * *

Mr. Lavine: It makes this difference, your Honor, from the jury's standpoint: That it then becomes a question of fact for the jury to determine whether the intermediary [655] merely acted as a chute through which the thing was done or whether the intermediary acted independently and without that causation. In other words, then it is a different situation than was presented in the Giles case and it becomes a question of fact for the jury to determine under those particular situations; and that is what we have submitted the instruction to your Honor on, to cover what we think is the law covering that situation.

The Court: If the court gives a number of instructions on legal philosophy to the jury, when it is all said and done, why, the chances are their own notions of what caused something [656] to be done is going to be about what they understand from all

the high-sounding phrases about reasonable and probable consequences, and natural consequences, and chain of circumstances, intermediaries, intervening causes, etc. [657]

... * * * * *

: Anything in 11-H?

Mr. Lavine: Yes, your Honor. Line 10 contains the word "information" again in place of the word "statements"——

The Court: "Statements or representations?"

Mr. Lavine: That is right. And then lines from 11 on down to the balance of the instruction, we think, amends the indictment by an instruction, because it tells the jury that it is not necessary for them to find that the statements and representations were untrue in all particulars or to the [662] full extent charged, etc.

We have proposed an instruction which I submitted to your Honor so that our legal position may be clearly presented, proposed instruction No. 24, that it is incumbent upon the Government to prove the indictment as laid beyond a reasonable doubt. And we do not think it is within the power of the court, and we would have to respectfully object to such an instruction as being in effect an amendment of the indictment.

The Court: The Government must prove everything it alleges or there cannot be a conviction.

: May I have the file, Mr. Clerk?

: In each count it is alleged that the applicant "stated and represented that he would immediately start a trucking business as an individual proprie-

torship under the trade name of" a certain trade name, "and that he was purchasing said vehicles for his own personal use or for the maintenance of said trucking business and not for the purpose of resale."

There are in effect three misrepresentations alleged in the charge, are there not?

Mr. Lavine: Yes, your Honor.

The Court: Is it your contention that the jury must find that all of those were false in order to convict?

Mr. Lavine: Yes, your Honor; I think that they must under the indictment as laid. The government did not have [663] to allege all of it, but they did.

The Court: Suppose the jury found, for example, that only it was false wherein the applicant said that he was purchasing the vehicles for his own person use and not for the purpose of resale; the other elements being present, would not that be sufficient to convict him?

Mr. Lavine: I do not believe so, your Honor, where they have laid a charge of this character. I think they are bound to prove it as laid.

The Court: Could any of it stand without all of it standing, Mr. Harrington?

Mr. Harrington: Why, certainly, your Honor.

The Court: I mean under the evidence here, could any of it stand without all of it?

Mr. Harrington: Well, yes. If the court please, for example, there the jury might decide that Mr. Todorow and Mr. Potolski are guilty of having

caused a false statement to be made, that is, namely, the statement in there "trucking" and at least which the evidence shows they stood behind them and told them to do. They might, however, on the other hand, decide that they did not cause the veterans to make the statements contained on the purchase-requisition form that they were buying it for resale.

The Court: What I thought about when I put the question to you was this: I said that you will agree that if the jury [664] finds any of those statements were false——

Mr. Harrington: And the defendants caused them to make it.

The Court: ——they would not be permitted, under the evidence here, to find that some of the others were true. In other words, if they believed that an applicant was not purchasing for his own personal use, they would also have to believe, at the same time, under the evidence here that the other statements charged were also untrue?

Mr. Harrington: Well, I do not think that would necessarily follow. [665]

* * * * *

The Court: I just wanted to raise that question while it is in my mind. I am not asking you to commit yourself to the instruction just at this point. I will start over again.

"In this connection you will undoubtedly have observed that in each of the four counts of the indictment it is alleged that the statements and representations contained in the prescribed forms were false and fraudulent [667] in sev-

eral particulars. It is not necessary for you to find that the statements and representations were untrue, or that these defendants caused such statements and representations to be made, in all particulars charged. The Government has sustained its burden of proof on this issue if you are convinced from the evidence beyond a reasonable doubt that any of the statements or representations contained in the forms was false in any material respect charged, and that the defendants knowingly and wilfully caused such false statement or representation to be made to the War Assets Administration, then knowing it to be false."

Mr. Harrington: That is satisfactory to the Government.

Mr. Lavine: Well, your Honor, that simply seems to me to go back to the same thing as amending the indictment. It is our position that the indictment alleges various transactions. That was the allegation that failed of the grand jury that returned the indictment. It is without the power of this court or the Government now to amend the indictment, and the instruction would in effect tell the jury that they could convict on part of the indictment and find that a certain statement of fact is true. And let us see what the foundation such a finding would have, your Honor, so that I make my position very clear to your Honor. [668] Assuming that the jury reaches a decision that one statement was true, and they reach a decision that another statement was untrue, yet by their general verdict

of guilty in this case they would be saying that all of those statements are untrue as alleged in the indictment. That is the effect of their finding of "guilty." You cannot segregate it in the verdict; it is there.

The Court: There are in effect three false statements alleged to have been caused by the defendants. Now, I take it that you would not contend that if the jury said: "Well, there are three false statements made here, two of them the defendants did not cause, but one they did, they could not convict on that one?"

Mr. Lavine: They could under your instruction.

The Court: Irrespective of that instruction, that would be legal, would it not? In other words, it would not be necessary for the Government to prove that all three statements were false and all three statements were caused to be made by both defendants in order to convict, would it?

Mr. Lavine: Under the allegations of this indictment, I think it would, your Honor.

The Court: I am willing to modify the instruction to merely limit it to tell the jury that they are not required to find that the defendants caused all but one of those statements to be made. [669]

Mr. Lavine: I do not see how the instruction can be given without altering the indictment, your Honor; and I stand on that proposition. And it invades the constitutional right of the defendants to have the Government prove its case as alleged in the indictment beyond a reasonable doubt as to the whole indictment, and not split it up for the pur-

poses of having the jury find that the whole charge in the indictment is true, even though half of it may be untrue and the other half be true.

The Court: Do you gentlemen feel that "statements and representations contained in the prescribed forms" is sufficient?

Mr. Lavine: Oh, I do not object to that portion of it.

The Court: I did not want to repeat the names of those forms.

Mr. Lavine: No, your Honor; I am not raising any petty objection like that, your Honor. I am attacking the instruction on the basic objection.

Mr. Baughn: For the record, your Honor, it is understood that I join with Mr. Lavine, I take it?

The Court: Yes. I think the Government is entitled to an instruction that the evidence need not show that every one of the statements charged was false, nor, if false, that the defendants caused every one of them to be made. It is sufficient if the jury find that one of those statements charged was false in a material particular and was knowingly [670] and wilfully caused by the defendants to be made; that that would be sufficient for a conviction on that count.

I cannot accept the view that the Government would have to have a perfect score in order to get a conviction where they allege three false statements and allege that all three were caused to be made by the defendants. It seems to me that if the Government proves one false statement and proves it was knowingly and wilfully falsely made by the

defendants, that that would be sufficient for conviction, even though the proof fell down on the other two. But your objections are in the record, gentlemen, in behalf of both defendants. [671]

* * * * *

The Court: I will modify proposed instruction 15-C to read:

“Where two persons are charged with the commission [679] of an offense, it is not necessary that the evidence show that each defendant himself committed each and every step necessary to the completion of the offense charged.”

Omit the remainder of that paragraph and Section 550 of Title 18. In the last paragraph I will quote from 550 and end up with the paragraph:

“Every person who thus knowingly and willfully participates in the commission of an offense is held to be guilty of that offense.”

Mr. Lavine: Well, we maintain our position in objection to the instruction as amended, your Honor. Your Honor has created a conspiracy charge here which we do not think is charged by the indictment. You have charged them both now with joint participation, and inferentially, at least, led to a situation which is, for practical purposes, a conspiracy.

The Court: Did there not used to be a song about “If I gave him the moon, he would cry for the sun?”

Mr. Lavine: I do not remember, your Honor, but that was not what I was asking for. I was only

asking for an instruction that I felt would do justice to my defendants.

Now 15-E, your Honor, I respectfully ask that it be removed. We have no desire to have that instruction given.

The Court: 15 what? [680]

Mr. Lavine: E.

Mr. Harrington: If the court please, that is a proposed Government's instruction. We have some concern in the matter.

Mr. Lavine: I thought that was the court's own instruction.

The Court: Well, the Government proposed one along that line, but if the defendant does not wish it—that is the instruction which limits the effect of evidence of other alleged acts of similar nature—I want the instruction to go in the record and show that the court proposed to give it and, at the request of the defendants, the instruction was not given.

Mr. Lavine: I want that to go in the record, your Honor. In fact, I would respectfully ask that the whole proposed instruction be in the record, be copied, so that the court reporter, if the occasion would arise, could include them in a transcript on appeal.

The Court: I can't do that. That clutters up the record too much. But, Mr. Reporter, will you copy instruction 15-E into the record at this juncture?

Mr. Clerk, will you hand that to the reporter? And, Mr. Reporter, your record will show as to

that instruction that the court proposed to give it and the defendants expressly requested the court not to give it. [681]

(The specified instruction is as follows:)

“There has been admitted in evidence in this case certain testimony as to alleged similar acts of the defendants claimed to have occurred prior to the time charged in the indictment.

“Evidence that an act was done at one time or on one occasion does not constitute evidence that a similar act was done at other times or on other occasions. That is to say, evidence that a defendant may have committed an earlier act of a like nature may not be considered in determining whether the accused committed any of the offenses charged in the four counts of the indictment.

“Nor may such evidence of another alleged act of a like nature be considered for any other purpose, unless the jury first finds from the other evidence in the case that the accused committed the particular offense charged in the count under deliberation.

“If the jury finds from other evidence in the case that the accused did the acts charged in the particular count under deliberation, then the jury may consider evidence as to an alleged earlier act of a like nature in determining the intent with which the accused committed the acts charged in the particular count. And the jury may infer guilty intent from [682] evidence as to an alleged earlier act of a like na-

ture, if the jury finds that such alleged earlier act is established by evidence which is clear and conclusive.”

Mr. Lavine: Now, as to each of these instructions which we have discussed here, your Honor’s decision not to put them in the reporter’s transcript, but will your Honor file a copy with the clerk?

The Court: The originals of all requested instructions are on file.

Mr. Lavine: Including your Honor’s?

The Court: Oh, my instructions are always filed.

Mr. Lavine: Very well. So that we would have a record of what we are talking about here. Otherwise, we are talking——

The Court: I am going to file the instructions as given.

Mr. Lavine: How about the proposed instructions which we are discussing now?

The Court: I will file the instructions requested by both parties and I will file the instructions as given.

Mr. Lavine: I have no other suggestions on the court’s proposed instructions. I do request each and all of the instructions which I proposed be given.

The Court: Irrespective of whether they are covered in the instructions to be given?

Mr. Lavine: Oh, no. If they are covered, I do not want them. I only know of one instruction, however, that was [683] covered the way I submitted it.

The Court: Those last paragraphs you put on

your instructions make them rather fatal, Mr. Lavine. I think everything you have requested is covered. I believe it is.

Mr. Lavine: Well, let's see, your Honor, and we will take this up so that my record may be clear.

The Court: Your record is clear. The original instructions requested are on file. You object to the court's failure to give any one of them that is not given.

Mr. Lavine: That is correct.

The Court: That is clear.

Mr. Lavine: But I must point out wherein we think we are entitled to have the instructions given, your Honor.

The Court: You do not need to point it out to me any more than the record will show and does show; and the Circuit Court is hereby advised that you have urged me to give all of those instructions and, insofar as they are not given, I have refused to give them.

I have spent a great deal of time on these instructions, and I think we have spent too much time here this afternoon particularly.

* * * * *

Mr. Lavine: Your Honor, in making my motions for judgment of acquittal I omitted renewing my motion on the ground the indictment did not state an offense against the laws of the United States on the grounds we have stated. I will urge a renewal of that motion, if I might be permitted to do so.

The Court: That ground may be deemed to have been one [690] of the grounds made upon the close of the Government's evidence, and again upon the close of all the evidence, on behalf of both defendants in support of the motion for judgment of acquittal. [691]

